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No. 98-534

In The

Supreme Court of the United States

October Term, 1998

PATRICK BRADY and SHAWN MURPHY,

Petitioners,

v.

STEVERSON DAVIS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY'S MOTION TO FILE AN AMICUS CURIAE BRIEF AND BRIEF IN SUPPORT

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MOTION

NOW COMES this Amicus Curiae Petitioner, The MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, by and through its attorney, Marcia L. Howe of JOHNSON, ROSATI, LABARGE, ASELTYNE & FIELD, P.C., requests the opportunity to file an Amicus Curiae Brief as follows:

1. The Michigan Municipal Risk Management Authority (MMRMA), is a public entity self-insurance pool authorized by the statutes of the State of Michigan to provide risk management and the pooling of municipal monies for a self-insured program.

2. The MMRMA is a public entity, self-insured pool providing liability and property coverage to its membership of more than 250 Michigan local governmental units. Members include cities, counties, townships, villages, health-related services, facilities, departments and agencies, municipal authorities, boards, and commissions, libraries and library systems, fire departments, courts, transportation departments, and cable communication services.

3. The MMRMA membership consists of municipal entities with a total of over 5,500 police officers.

4. The MMRMA and its membership are greatly concerned about the erroneous, published decision issued by a panel of Judges of the Sixth Circuit Court of Appeals in *Davis v. Brady* because it imposes a tremendously burdensome and unfair duty upon police officers to insure the safety of intoxicated, homeless individuals *after* they are released from police custody to their own personal

recognizance. This decision suggests that if any intoxicated, homeless person is apprehended, then that unlucky law enforcement officer must provide protection and assistance until the state of intoxication has passed or their safety is insured after they are released from custody, which could possibly include a lengthy medical process.

5. This overburdensome and impossible duty conflicts with the individual police officer's legal duty to enforce the law and his legal obligation to intervene into disputes or disagreements, often involving intoxicated persons. This Court cannot possibly want to inhibit an officer's performance of this duty and obligation.

6. The MMRMA and its police officers are deeply concerned because this new development broadly expands the *constitutional* duties of protection and places the overwhelming social problem onto the shoulders of individual police officers. In doing so, this *Brady* opinion fails to clearly articulate the correct scope or standard of that duty except that it may be read to make *individual* police officers the guarantors and protectors for the ultimate safety of intoxicated, homeless persons apprehended for destructive or assaultive behavior. Thus, this Court's guidance is needed to consider and more clearly articulate the degree of the officer's obligation to a released, but homeless person. The scope of the duty must be readily measurable so that municipal entities and its employees can be guided as to what they MUST do to avoid the personal liability of a constitutional violation under such difficult and impossible circumstances.

7. The MMRMA and the police officers are concerned that the *Brady* decision has essentially converted what, at best, would be a state tort negligence action into the constitutional violation of major proportions. The impact of the *Brady* decision imposing an affirmative duty to protect an intoxicated, homeless person after they are released from custody is of vital importance to society. The judiciary is ill-equipped to develop federal common law to address this national social problem, which is the core of this complaint. Imputing society's failure to remedy *the* social problem of homeless, intoxicated individuals to the law enforcement officer is simply unfair and unconscionable.

8. Furthermore, the *Brady* decision erroneously found that these particular police officers were *not* entitled to qualified immunity. Currently, a conflict exists among the appellate circuits as to whether there is *new* substantive due process liberty interest and under what circumstance there is a duty for police officers to protect. Prior to *Brady*, the Sixth Circuit Court of Appeals had not addressed this issue. Likewise, at the time of the 1994 occurrence, this Court had not spoken on this particular issue of police misconduct under similar circumstances. Unquestionably, the published *Brady* decision is dramatic new law. This liberty right and attending duty to protect a homeless, intoxicated person after they are released was *not* clearly established for purposes of avoiding qualified immunity. Instead, the *Brady* decision incorrectly found that the right was clearly established allegedly based upon the Supreme Court decision in *DeShaney v. Winnebago Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L. Ed.2d 249 (1989) and a few appellate circuit courts'

recognition of a duty to protect in the "abandonment" cases. Yet, the Sixth Circuit misapplied the "clearly established" test and constitutional law. If the *Brady* test of "clearly established" is so lenient and so minimal, then this new test of what is "clearly established" abrogates qualified immunity for police officers.

WHEREFORE, the Michigan Municipal Risk Management Authority, and its membership respectfully requests that this Court grant its Motion to File an Amicus Curiae Brief, consider its arguments carefully, and reverse or vacate this *Brady* decision.

Respectfully submitted,

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BRIEF IN SUPPORT

I. THE INDIVIDUAL POLICE OFFICER SHOULD NOT BEAR THE BURDEN OF OUR SOCIETY'S INABILITY TO ADDRESS ITS PROBLEM OF ASSISTING OR PROTECTING INTOXICATED, HOMELESS PERSONS BY THEN IMPOSING THE OVERWHELMING BURDEN OF PROTECTING AND INSURING THE SAFETY OF INTOXICATED, HOMELESS PERSONS, EVEN AFTER THE CUSTODIAL ENVIRONMENT IS EXTINGUISHED AND THE OFFICER'S SPECIAL RELATIONSHIP WITH THIS INDIVIDUAL HAS TERMINATED, UPON THE INDIVIDUAL POLICE OFFICER, WHO IN THE PROCESS OF PERFORMING HIS LAW ENFORCEMENT DUTY AND OBLIGATION, HAS THE MERE MISFORTUNE OF ENFORCING THE LAW AGAINST THIS INTOXICATED, HOMELESS PERSON.[1]

A. The individual police officer does not owe a constitutional duty to a homeless, intoxicated person to protect him after they release him from the police vehicle because the officers did not increase the danger to this person, who resumed his freedom on the streets.

42 U.S.C. § 1983 is not a source of substantive rights, but merely provides a vehicle for vindicating established federal rights that are violated. *Albright v. Oliver*, 510 U.S.

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[1] The Respondent has not returned my phone calls regarding that party's consent to the filing of the Amicus Brief so a Motion to File the Amicus Brief has been filed. Counsel for a party did not author this brief in part or in whole. No person or entity, other than the *Michigan Municipal Risk Management Authority* financed the brief.

266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). It was only recently that substantive due process claims were considered in the context of employment cases, but recovery was permissible only in cases where the most egregious executive action has occurred. *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).

This Amici suggests that the *Brady* decision improperly over-expanded the duties of police officers. Most importantly, it bestowed upon the intoxicated, homeless person a right to be affirmatively protected by the police officers whenever there is a prior custodial relationship between the officer and that person, which was impermissibly extended to include the time after the custodial environment had terminated. This Amici respectfully suggests that the Sixth Circuit was overly "intoxicated" by its opportunity to create law:

> The Common Law is the perfection of human reason, – just as alcohol is the perfection of sugar. The subtle spirit of the Common Law is reason double distilled, till what was wholesome and nutritive becomes rank poison. Reason is sweet and pleasant to the unsophisticated intellect; but this sublimated perversion of reason bewilders, and perplexes, and plunges its victims into mazes of error.
>
> The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till, by this accommodating principle, a whole system of law is built up without the authority or interference of the legislator. Robert Rantoul, *Oration at Scituate* (July 4, 1836), *in* Kermit L. Hall et al., *American Legal History* 317, 317-18 (1991), cited by Justice Scalia,

A Matter of Interpretation: Federal Courts and The Law, p. 10-11.

Amicus suggests that the Sixth Circuit has simply gone too far in imposing a duty to protect in this instance where these facts, which are akin to those in *DeShaney v. Winnebago Co. Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), mandate a decision in favor of the Officers in this case.

Furthermore, this new right conflicts directly with a police officer's duty to enforce the law. Justice Levin's dissent in the Michigan Supreme Court, *White v. Beasley*, 453 Mich. 308, 552 N.W.2d 1 (1996), cited this long recognized state authority:

> It shall be the duty of the police and night-watchmen and officers of the force under the direction of the mayor and chief of police, and in conformity with the ordinances of the city, and laws of the state, to suppress all riots, disturbances and breaches of the peace and to pursue and arrest any person fleeing from justice in any part of the state; to apprehend any and all persons in the act of committing any offense against the laws of the state, or the ordinances of the city, involving a breach of the peace, and to take the offender forthwith before the proper court or magistrate, to be dealt with for the offense; to make complaints to the proper officers and magistrates of any person known or believed by them to be guilty of the violation of the ordinances of the city, or the penal laws of the state; and at all times diligently and faithfully to enforce all such laws, ordinances and regulations for the preservation of good order and the public welfare as the council may

> ordain; and to serve all process directed or delivered to them for service, and for such purposes the chief of police, and every policeman and night watchman, shall have all the powers of constables, and may arrest upon view and without process, any person in the act of violating any ordinance of the city involving a breach of the peace, or of committing any crime against the laws of the state. The chief of police and any policeman may serve and execute all process in suits and proceedings for violations of the ordinances of the city, and also any other process which, by law, a constable may serve. M.C.L. § 92.4, M.S.A. § 5.1752 (emphasis added). See also, M.C.L.A. 752.11, M.S.A. 28.716 (101)[2]

In this matter, the Officers were called to investigate a call for assistance on the destruction of property at the Carriage House Mission, a shelter for the homeless. They could not avoid the duty although they are informed that an intoxicated person was causing the destruction of property. They received this call and *must* provide assistance. To arrive and do nothing to stop the destruction of private property would serve neither their statutory duty nor the public's wishes. Here, the only alternative to stop the destruction of the shelter's property was to remove the intoxicated, homeless person from that environment.

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[2] Any public official, appointed or elected, who is responsible for enforcing or upholding any law this date and who willfully and knowingly fails to uphold or enforce the law with the result that any person's legal rights are denied is guilty of a misdemeanor.

Rather than confront the officer's duty and obligation to enforce the law, the Sixth Circuit improvidently created this new right on the basis that, if the individual employee did have direct contact with the party, then that employee owed a duty not to subject him or her to danger *and* the officers must have acted in a sufficiently "culpable" manner to be liable under a substantive due process theory. *Stembler v. City of Florence*, 126 F.3d 856 (6 CA 1997), (Petition for Cert. filed February 11, 1998, No. 97.1376).

The Sixth Circuit failed to sufficiently distinguish the highly pertinent facts of *Stembler* from those relevant, uncontroverted facts of the instant case. The Sixth Circuit's opinion was based on the erroneous premise that these Officers increased the danger to the Plaintiff by releasing him or dropping him off near a park. Logically, where else could they take a homeless person? Surely, he could not go back to the shelter he attempted to destroy. The County jail did not have room to house him. The Officers simply opened a car door and released him into the streets. No matter where the Officers left Plaintiff, he would be subjected to the street, as he was prior to his apprehension.

These Officers did not create or increase the danger to this individual. These Officers did *not* cause Plaintiff to become homeless. The Officers did not provoke Plaintiff into destroying the Mission's property.[3] The Officers did not create the state of intoxication or the Respondent's

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[3] *County of Sacramento v. Lewis*, ___ U.S. ___, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)

destructive, abusive and assaultive behavior. They did not create the overcrowding at the Genessee County Jail nor refuse him incarceration, which is, in essence, his home for the night. Instead, the Officers fortuitously are called to face a potentially dangerous situation and are required by law to act. Thus, the Sixth Circuit's basis for establishing a special relationship is faulty because it premised its decision on the misconception that the Officers increased the danger to Respondent where, in fact, they merely returned him to his prior existence, albeit in a different location. The location did not increase the danger at all.

> Police officers, especially when faced with a potentially dangerous situation, must be given a wide degree of discretion in determining what type of action will best ensure the safety of the individuals involved and the general public, the cessation of unlawful conduct, and the apprehension of wrongdoers. The determination of what type of action to take, e.g., make an immediate arrest, pursue a suspect, issue a warning, await backup assistance, etc., is a discretionary-decisional act entitled to immunity. Once that decision has been made, however, the execution thereof must be performed in a proper manner, e.g., the arrest must be made without excessive force, the pursuit of the suspect must not be done negligently, the request for assistance must include reasonably accurate information, etc. Since plaintiffs merely alleged negligent performance of a discretionary-decisional act, summary judgment for the individual officers was properly granted. *Morse v. City of Mount Pleasant*, 160 Mich. App. 741, 748-749, 408 N.W.2d 541

(1987) Judge Sawyer's dissent, reversed in 431 Mich. 888 (1988).

In *Bogan v. Scott-Harris*, ___ U.S. ___, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998), this Court was hesitant to place individual municipal officials in positions of personal liability for fear of the effect of that liability upon the individual official trying to serve a public purpose. There, this Court extended absolute immunity, even in a civil rights discrimination claim, to avoid that consequence.

Likewise, it is naive and unfair for this Court to ignore the impact upon these individual Officers by the imposition of personal liability upon them in this circumstance where they are literally caught between a rock and a hard place. Mere allegations, personal liability, and this impossible working condition does impact these Officers personally and professionally. What can they do when the jail is overcrowded and the court prohibits the addition of other inmates, even if it is to protect him? The Sixth Circuit offered no guidance in that regard, but the implication is surely that the Officers should have avoided that impossible situation, avoided the obligation to enforce the law, and thus, avoided the attending responsibility for the intoxicated, homeless person. If society does not care about this homeless person, then why would the courts impose that burden upon the Officer, who had no choice but to apprehend and remove the Respondent from the scene. The affirmative right to governmental aid was not established in *DeShaney*. *Id*. Mere knowledge of a danger does not create an affirmative duty to protect, which arises only if an injury occurs while in custody or an affirmative act while in custody prevents the person

from acting on his own behalf. *DeShaney*, 489 U.S. at 200, 109 S. Ct at 1005-1006.

In the December 1994 case, *Gazette v. Pontiac*, 481 F.3d 1061 (6 CA 1994), the court defined the *DeShaney* duty as a "duty to protect [that] can arise in a noncustodial setting if the state does anything to render an individual more vulnerable to danger." *Id.* at 1065. Further, the court states that "*DeShaney* did not specify what actions of a state would render a person more vulnerable to danger, nor how much more vulnerable to danger a state must make a person before the person's due process was violated". In *Gazette*, the officers' lies of telling the family that they were investigating the missing person was not casually connected to the injury. The injury was too remote from the officers' failure to protect the plaintiff from criminal acts of third-parties. At best, such a claim constituted gross negligence, not a constitutional violation.

In *Brady*, nothing occurred while Plaintiff was in custody that prevented him from acting on his own behalf when he was released. He sustained his injury from a third-party **after** the Officers released him from their custody. His injury was unrelated to Respondent's location. Contrary to the *Brady* holding, these Officers did not create any danger in the situation. They merely placed him back into his prior environment.

In Michigan, the courts would not recognize a special relationship between the plaintiff police officer's estate and the Department of Corrections' officials for injuries sustained as a result of the escaped prisoners' actions of shooting the police officer to death. *Chivas v. Koehler*, 182

Mich. App. 467, 453 N.W.2d 264 (1990). Likewise, in *Harrison v. Director of Dept. of Corrections*, 194 Mich. App. 446, 487 N.W.2d 799 (1992), governmental officials did not have a special relationship with the plaintiff that was murdered by prisoner while on parole. See also *Massey v. Department of Corrections*, 182 Mich. App. 238, 451 N.W.2d 869 (1990)[4] If the state courts do not recognize a special relationship between the third-party injured by the prisoner after custody was terminated, then the federal court should not create a constitutional duty, which is owed to previously apprehended person for injuries he sustained after custody is terminated. These state and federal courts refused to extend the special relationship to circumstances where the injury sustained is too remotely connected to the officers' actions. Therefore, no special relationship can exist when the Officers' actions were nothing more than the Respondent's exit from the vehicle. Even if you assume *arguendo*, that the Officers required Respondent's exit, their actions were too remote from the subsequent injury of being hit by an automobile driven by a third-party. The Officers did not intend to harm. It was not readily identifiable that he would be endangered by merely ordering him to leave their vehicle. Officers must be entitled to unrestricted discretion to make such decisions.

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[4] In *Gazette v. Pontiac, supra*, the federal courts found no special relationship between the missing person's family and the officers that assured the family that they were investigating their relative's disappearance. No special relationship was found to exist, although the officers had direct contact with the family.

The *Brady* holding that the release of the Plaintiff at a park was bad police judgment, ignored the lack of causal connection between the park and this Respondent's injury. He was not injured by exposure to the elements by being left near or in a park. In fact, he had contact with at least two human beings immediately after he was released from the patrol vehicle. He was not injured in the park. Rather, he was hit by a car as he walked on a pubic street. Yet, the uncontroverted fact is that every homeless person is subjected to the streets, including Respondent before and after his arrest. The Sixth Circuit erred by expanding substantive due process protection based upon the faulty premise that his danger was enhanced by his release.

The extremely punitive nature of the imposition of this duty to protect was disproportionate to Officers' lack of culpability. This heavy burden inhibits available alternatives and unwisely expands the scope of a substantive due process claim to encompass a wide range of police misconduct instances, some which undoubtedly were not contemplated even by the *Brady* panel thereby creating another slippery slope for finding liability. Rather than the ill-prepared judiciary, the more wiser route is to allow the Legislature to exercise its problem-solving, fact-finding role before imposing liability. (See Christopher Gencks, *Rethinking Social Policy; Raised, Poverty and Underclass*, 150 (1992), which reviewed the declined work ethic evidenced by the growing, voluntary underclass. According to that study, the persons who did not work all day even though they were neither excused by disability or

enrollment from school rose from 12.3% in 1968 to 21.8% in 1997.)[5]

B. The *Brady* decision is wrong and must be vacated because it weakens plaintiffs' burden in a substantive due process claim to a standard of nothing more than the mere exercise of bad judgment, a standard equated more with negligence than the exercise of egregious, arbitrary governmental power.

In the quiet hindsight of a courtroom, the *Brady* court concluded that the Officers exercised poor judgment. Yet, the standard of "poor judgment" does not encompass the level of culpability that is necessary to establish a substantive due process claim. In *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), this Court precluded a due process claim where the prisoner merely complained that he had slipped and fell on a pillow left on the stairs by a guard. This Court stated that the "lack of care" by a state official did not justify a deprivation of

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[5] Jane Jacobs, *The Death and Life of Great American Cities* (1961). There, she states that a successful city district must permit the persons to remain personally safe and secure on the street among strangers. Any city that fails to provide that atmosphere is bound to be in trouble. "[V]isible, physical and social disruption is a signal that the mechanisms by which healthy neighborhoods maintain themselves are broken down. An area loses its capacity to solve even simply-minded problems, its character becomes suspect." Wesley G. Skogan, *Disorder and Decline: Crime in the Spiral of Decay in American Neighborhoods* (1990) p. 48. Police play an essential role in maintaining orderliness in the city streets. Jacobs, *Death and Life, supra* at 31-32.

the life, liberty or property provision of the Fourteenth Amendment. "The touchstone of due process is protection of the individual against arbitrary action of government". *Daniels, supra,* 474 U.S. at 332, 106 S.Ct. at 665. At that time, this Court correctly stated:

> We think that the actions of prison custodians in leaving a pillow on the prison stairs, or mislaying an inmate's property, are quite remote from the concerns just discussed. Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.

In *Pearson v. Grand Blanc Twp,* 961 F.2d 1211 (6 CA 1992), the standard for a substantive due process claim in a property/zoning context was that the municipal must exhibit "extreme irrationality". Shortly before this incident, the Sixth Circuit, which chastised the exercise of poor judgment by an individual officer that abandoned a 2 year old and a 14 year old on the street after their grandmother was arrested. Yet, the court did not impose liability upon the officer, but fact, afforded that officer qualified immunity. *Walton v. Southfield,* 995 F.2d 1331, 1333 (6 CA 1993). Poor judgment cannot be the proper standard, only the most *egregious* abuse of power should be shocking to the judicial conscience. *Collins v. Harker Heights, supra.* Negligently inflicted harm cannot rise to the level of a constitutional deprivation. *Daniels v. Williams, supra,* 474 U.S. at 327, 331.

Here, the Officers inflicted no direct harm. These Officers intended no harm at all. The injury to this Plaintiff was too remote from the Officers' actions. The Officers' culpability is too minimal to warrant the over broad expansion of the substantive due process protection in this instance. The facts of this case, as Petitioner points out, are more akin to the facts in *Foy v. City of Berea*, 58 F.3d 227, 231 (6 CA 1995). Essentially, the *Foy* decision held that the injury was too remote and the allegations were nothing more than gross negligence. There, the intoxicated young men were severely injured in a car accident after the officers ordered them to leave in their vehicle.

Likewise, Michigan Supreme Court has considered this exact dilemma for a police officer in both state and federal claims. The mid-level appellate court in *Williams v. Thompson*, 169 Mich. App. 843, 426 N.W.2d 417 (1988), concluded that a question of material fact existed as to whether police officers *should* have taken action to take an intoxicated driver into protective custody under M.C.L. 331.6501(I), M.S.A. 14.15 (6501)(I). The Michigan Supreme Court preemptively reversed in *Williams v. Thompson*, 434 Mich. 857, 415 N.W.2d 368 (1990) because the Supreme Court refused to impose tort liability and acknowledged an officers' need to exercise their discretion when determining the right action to take upon discovering an individual that might or might not be incapacitated. It is easy only in hindsight to determine that a particular person is incapacitated.

Similarly, in *Trimper v. Headapohl*, 162 Mich. App. 320, 327, 412 N.W.2d 731 (1987), reversed 434 Mich. 858, 450 N.W.2d 559 (1990), the officers had responded to a call of a "man down", which meant that he was lying intoxicated in the street. After returning him to his apartment building, they left him in the vestibule. Apparently, he later spent seventeen days in the hospital due to his injuries he had incurred. Notwithstanding the officers' knowledge of the man's predicament and their affirmative acts of placing him in the vestibule, the Michigan Supreme Court reversed and held that the decision to take or not take this person to the hospital was protected by this State's governmental immunity act against tort liability. M.C.L 691.1401, M.S.A. 3.996(101).

Most notably, the Michigan Court of Appeals in *Trimper* specifically declined a constitutional claim stating that:

> "Headapohl's and Yaklin's failure to provide medical care to plaintiffs was, at most, mere negligence and not a denial of constitutional rights. Ordinary negligence alone will not support a 42 U.S.C. 1983 claim. See *Daniels v. Williams*, 474 U.S. 327, 106 S Ct. 662, 88 L.Ed.2d 662 (1986)"

Thus, Michigan law embraced an individual officer's need for broad latitude in the exercise of their decision-making, discretionary powers. In *Trimper* and *Thompson*, the appellate courts declined to expand the constitutional protections to circumstances strikingly similar to the circumstances in the instant case. The only factual difference between Respondent and the plaintiffs in *Trimper* and *Thompson* is that Respondent was homeless. Notably

though, in each case the individuals are not injured because of WHERE they are released, but by the mere fact that they ARE released and unbeknownst to the officers, who are not medical experts, severely at an alleged risk due to the extreme nature of their state of intoxication or an unknown medical risk.

Thus, the state court found no viable state tort claim or constitutional claim and recognized that such allegations were tantamount to allegations of negligence. Federal constitutional jurisprudence should not expand federal protections and duties to create liability under the guise of a substantive due process claim for mere negligence or gross negligence. The *Brady* decision was wrong because it applied a deliberate indifference standard and because it watered down the substantive due process standard to little more than, at best, extremely bad judgment.

These circumstances do not, unfortunately or not, shock the conscience of our society because the homeless, intoxicated person, willingly or otherwise, is left to fend for him or herself. Rather than legislatively face this dilemma, the judiciary created the moral and legal obligation for an individual officer to insure the safety of a homeless, intoxicated person. The *Brady* decision reflects how the judiciary is too ill-equipped and uninformed about the underlying social problem to offer a wise, proper analysis. Instead, it is judicial lawmaking that is offensive to the protection of the separation of the powers. This opinion is merely a substitution by a judge in hindsight as to what he would have done in that circumstance. It is clear overreaching by the court.

If however, this Court chooses to recognize a substantive due process in this context, then this Court must carefully particularize the right and define the parameters of the required protection. At a minimum, the *Brady* decision must be remanded for more specific guidance to direct these Officers, and all law enforcement officers, to the particular parameters of the right and their duty when releasing homeless, intoxicated persons. Officers must be informed of their viable alternatives and a constitutionally acceptable method of determining, while working the streets, just how intoxicated or incapacitated a particular individual would have to be before they must protect them from themselves, while balancing the civil rights of persons using public highways or sidewalks. Simply, the Sixth Circuit's analysis was too shallow and improperly extended the duty to protect.

This Court must undo any impact of the published decision of *Brady* because it unwisely sets a standard that would make the police officers the insurers of the individuals apprehended, even after they are no longer in custody. The broad application of such a lenient standard cannot be overlooked or minimized by this Court for the sake of "waiting" until a number of federal appellate circuits have made decisions on the substantive due process claim analysis. Police officers, and even litigants, should not lose this Court's consideration because this Court considers the issue insufficiently developed by the appellate circuit courts. At a minimum, the result of the *Brady* decision is so egregiously wrong and inconsistent with *DeShaney* that it deserves vacation until a better standard or more thoughtful analysis can be considered, if only by this same appellate court. The *Brady* decision

cannot remain viable or implicitly viable until a "better" case comes along.

C. In November 1994, no substantive due process right to protect and guarantee the safety of an intoxicated, homeless person from being hit by a third-party's automobile after his release was established such that the officers would have known that their particular actions in this particular situation deprived the plaintiff of his liberty right under the U.S. Constitution.

In *Walton v. Southfield, supra* at 1336, the court protected the officers with qualified immunity because the question of "whether the abandonment of a minor by police could be a constitutional violation of the liberty interest in personal security" had not yet been clearly established. The 1993 *Walton* decision did not recognize such a right. The *Walton* court did, however, articulate the recognized test for determining whether a right was clearly established by looking "first to decisions of this court and other courts within our circuit, and finally to decisions of other circuits." *Walton*, 996 F.2d at 1336. The *Brady* court did not follow that test.

In discussing the imposition of liability under either a special relationship or increasing the danger theory, the court in *Walton* set forth in numerous cases throughout the circuits reaching inapposite results. These same cases are still good law today in most of their circuits. No definitive answer from this Court, the Sixth Circuit or many other circuit courts has been pronounced on this issue. Undisputedly, no case has been decided with these same facts in any one of the circuits. In fact, the State law

held to the contrary of *Brady*. Thus, this new substantive due process right and its attending "absolute" protection and duty was *not* clearly established in 1994 when this incident occurred.

The *Brady* court relied upon *Stembler v. City of Florence, supra*. There, the court found that a duty to protect did exist because the plaintiff, while in custody, was exposed to the police officers' affirmative act of physically placing the plaintiff, against her will, into a vehicle with her assailant and informing that she must remain in the vehicle or be subject to arrest. She was forced to be imprisoned in the vehicle with her assailant. In reality, *Stembler* supports Petitioner's argument because these Officers did *not* restrain Respondent from acting on his own behalf. Instead, it was merely a failure by these Officers to act on behalf of Respondent.

In addition to being factually distinguishable from *Stembler*, this case shows no such right was established as late as 1997. The 1997 *Stembler* decision was a novel step for the Sixth Circuit, even if this Court does not believe that it improvidently extended the duties of law enforcement agents to protect. On that basis alone, summary judgment was required in this case because no prior precedent addressed the facts in the *Brady* decision. It was only recently that this Court considered the substantive due process right to be safe in the employment situation in *U.S. v. Lanier* 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). Thus, the *Stembler* case and the *Lanier* case, which were not decided until 1997 and long after the incidents in the *Brady* decision had occurred, cannot be the measuring stick for whether the right or duty was "clearly established" in 1994.

The *Brady* court glossed over the lack of clearly established precedent as easily as it glossed over its reduced burden requiring only deliberate indifference that amounted to nothing more than a showing of poor judgment, at best, and gross negligence at the worse. This Court needs to vacate and reverse the *Brady* decision, or, at a minimum, remand it with instructions to provide a more particularized definition of the right and the extent of the duties. A failure to do so will result in the possible conclusion that, once a law enforcement officer in the Midwest takes any intoxicated, homeless person into custody, then this officer cannot release that person unless that officer can guarantee that, after the person's release, he will not be subject to any injury. Such a result cannot be the law under any test, whether classified as deliberate indifference or shocks the conscious. The Constitution should not be interpreted to place police officers in the position of insuring the safety of intoxicated, homeless persons after their release back into society and onto the streets.

In conclusion, police officers are not medical experts or technicians. Police officers are not social workers or psychologists. Most importantly, police officers are not mind readers that can guess what appellate court judges will conclude that they should have done to meet their constitutional obligations where there is nothing in any preceding and pertinent court decision informing them of that duty. The Sixth Circuit Court of Appeals decision is clearly erroneous and its precedent must be vacated to allow for a better reasoned opinion, which at a minimum

accepts the lack of clearly established precedent on this particular issue at the time of this incident.

Respectfully submitted,

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